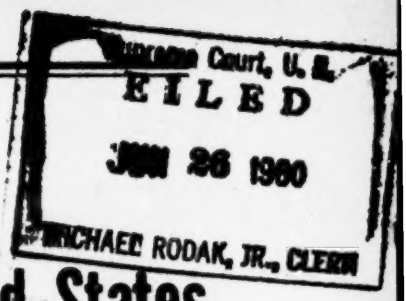
VOL. I



IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GRISBAUM & KLEPPNER
FERDINAND J. KLEPPNER
Professional Building
3224 North Turnbull Drive
Metairie, Louisiana 70002

ATTORNEYS FOR PETITIONERS

INDEX

Page

Petition For Writ of Certiorari to the Supreme Court of Louisiana 1

Citation to Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Amendment IV 3

Amendment XIV. Section 1. 3

Article 1, Section 2 4

Due Process of Law 4

Article 1, Section 5 4

Right to Privacy 4

Rule 41. Search and Seizure 4

(a) Authority to Issue Warrant 4

(b) Property or Persons Which May Be Seized With a Warrant 5

(c) Issuance and Contents 5

INDEX CONTINUED

Page

(1) Warrant Upon Affidavit 5

(2) Warrant Upon Oral Testimony 6

(A) General Rule 6

(B) Application 6

(C) Issuance 6

(D) Recording and Certification of Testimony 7

(E) Contents 7

(F) Additional rule for execution 7

(G) Motion to suppress Precluded 7

Statement of the Case 8

Federal Questions Raised and Decided Below 12

Argument and Reasons for Granting the Writ 14

Conclusion 49

Certificate of Service 50

Appendix A A-1

Appendix B A-261

Appendix C A-271

LIST OF AUTHORITIES

Page

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) 35

Arkansas v. Sanders, 99 S. Ct. 2586 45

Brock v. United States, 223 F.2d 681 (5th Cir., 1955) ... 15, 18

Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925) 44, 46

Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1969) 44, 45

Commonwealth v. Myers, 361 A. 2d 884 (Pa. 1976). 18, 19

Coolidge v. New Hampshire, 403 U.S. 443, 474 ..... 41, 43, 44, 48, 49, 15

Fixel v. Wainwright, 492 F.2d 480 (5th Cir., 1974) 25, 26

G.M. Leasing Corporation v. United States, 429 U.S. 338, 354, 97 S. Ct. 619, 50 L.Ed. 2d 530. 48

Hester v. United States, 265 U.S. 57 44 S. Ct. 445, 68 L. Ed. 897 (1924) 23

In Re Brewer, 24 Ill. App. 3rd 330, 320 N.E. 2d 340 (1974) 19

Johnson v. United States, 333 U.S. 10, 13, 14, 68 S. T. 367, 92 L. Ed. 436 (1948) 43

LIST OF AUTHORITIES CONTINUED

Page

Jones v. United States, 357 U.S. 493, 499 (1958) 78 S. Ct. 1253, 2 L. Ed. 1514 ..... .47

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) 15, 20, 23, 25, 26, 31, 33

Lorenzana v. Superior Court of Los Angeles County, 9 Cal. App. 3d 626, 108 Cal. Rptr. 585, 511 P. 2d 33 (1973) ..... .30

Ludlow v. State, 314 N.E. 2d 750 (Ind. 1974) ..... .47

McDonald v. United States, 335 U.S. 451, 456 (1948), 69 S. Ct. 191, 93 L. Ed. 153 ..... .47

Olmstead v. United States, 277 U.S. 438 (1928) ..... .24

Patler v. Slayton, 503 F.2d 472, 477 (4th 1974) 23

Payton v. New York, (No. 78-5420) (1980) 6, 48

People v. Abruzzi, 52 A.D. 2d 499, 385 N.Y.S. 2d 94, 97 (App. Div. 1976) ..... .20

People v. Fly, 34 Cal. App. 3d 665, 110 Cal. Rptr. 158 (1973) ..... .29

People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146, 151 (1973) ..... .30

People v. Walker, 64 Mich. App. 138, 235 N. W. 2d 85 (1975) ..... .19, 37

LIST OF AUTHORITIES CONTINUED

Page

People v. Weisenberger 216 P. 2d 1128 (Col. 1973) 27

Phelan v. Superior Court of Mariposa County, 151 Cal. Rptr., 599, 603 (Ct. App. 1979) 18, 28

Riddick v. New York, (No. 78-5421) (1980) 26

Roaden v. Kentucky, 413 U.S. 96, 595, 93 S. Ct. 2716, 37 L. Ed. 2d 757 (1973) 47

Rakas v. Illinois, 439 U.S. 128; 99 S. Ct. 421; 58 L. Ed. 2d 387 (1962) .14, 15, 24, 30, 32, 33, 34, 35

State v. Allan, 113, N.J. Super. 245, 273 A. 2d 587 (App. Div. 1970) 37

State v. Byers, 359 So. 2d 84 (La. 1978) 23

State v. Dupuis, 378 So. 2d at 937 ..... 16, 33, 42

State v. Hinton, 305 So. 2d 804 (Fla. 4th D. C. A. 1975) 37

State v. Lamartiniere, 362 So. 2d 526 (La., 1978) 16

State v. Mankel, 27 Ariz. App. 436, 555 P. 2d 1124 (1976) 47

State v. Parker, 355 So. 2d 900 (La. 1978) 43

State v. Porter, 324 N.E. 2d 857 (Ct. App. Ind. 1975) 40

LIST OF AUTHORITIES CONTINUED

Page

State v. Rudolph, 369 So. 2d 1320 (La., 1979) 38

State v. Wert, 550 S. W. 2d 1, ...29

State v. Watkins, 237 N.W. 2d 14 (S.D. 1975) 18

Texas v. Gonzales, 388 F. 2d 145 (5th Cir. 1968) 15

T. L. W. v. State, 315 So. 2d 202 (Fla. 3rd D.C.A. 1975) 37

United States ex rel Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) 34

United States v. Alexander, 559 F.2d 1339 (5th Cir. 1977) 46

United States v. Anderson, 500 F.2d 1311, 1315 (5th Cir., 1974) 46

United States v. Bradshaw, 490 F.2d 1097, 1100 (4th Cir., 1974) 15

United States v. Britt, 5 Cir. 1975, 508 F.2d 1052, 1055 Cert Denied 423 U.S. 825, 96 S. Ct. 40, 46 L. Ed. 2d 42 31

United States v. Brown, 473 F.2d 952 (5th Cir., 1973) 23

LIST OF AUTHORITIES CONTINUED

Page

United States v. Carriger, 541 F.2d 545, 550 (6th Cir. 1976) 24

United States v. Chadwick, 1977, 493 U.S. 1, 11, 97 S. Ct. 2476, 2483, 53 L. Ed. 2d 538, 548 31

United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1976) 44

United States v. Chapmen, 474 F.2d 300 (5th Cir. 1973) 46

United States v. David 423 F.2d 974 (5th Cir. 1970) 16

United States v. Davis, 423 F.2d 974 (5th Cir., 1970), Cert Denied, 400 U.S. 836 (1970) 26, 33

United States v. Freie, 545; F.2d 1217, 1223 (9th Cir. 1976) 23

United States v. Hart, 162 F.2d 74 (10th Cir., 1974) 47

United States v. Hollon, 420 F.2d 302 (5th Cir., 1970) 23

United States v. Holmes, 521 F.2d 859 (5th Cir., 1975) 17, 18, 27

United States v. Jeffers, 342 U.S. 48 51 72 L. Ct. 93, 96 L. Ed. (1951) 47

LIST OF AUTHORITIES CONTINUED

Page

United States v. Johnson 541 F.2d 1311, 1316 (8th Cir., 1976) 15

United States v. Nieto, 510 F.2d 1118 (5th Cir. 1975) 47

United States v. Perez, 440 F. Supp. 272, 287 (Ohio, 1977) 23

United States v. Chapman, 474 F.2d 300 (5th Cir. 1973) 46

United States v. Rios, 611 F.2d 1335 (10th Cir. 1979) 32

United States v. Vicknair, 610 F.2d 372 (5th Cir., 1980) 30, 31

Walker v. United States, 225 F.2d 447 (5th Cir., 1955) 34

Williams v. United States, 404 F.2d 493 (5th Cir., 1968) 37

U.S. Constitution

Amendment IV 3, 12, 13, 15

Amendment XIV 3, 4

Article 1, Section 2 3

LIST OF AUTHORITIES CONTINUED

Page

Article 1, Section 5 4

Federal Rules of Criminal Procedure Rule 41 . . . . . .5, 6, 7, 11

IN THE SUPREME COURT OF THE
UNITED STATES

TERM 1979

NO.

JEFF H. DUPUIS;
BERNIS H. DAVISON;
JOHN ZERBE*, and
WILBUR L. SMITH

Petitioners

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1980, refusing to overrule a decision of the Trial Court denying Petitioners' Motion to Suppress Evidence.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana in ***State of Louisiana v. Dupuis, et al*** is reported at 378 S.2d 934 (La., 1979) and is set out in ***Appendix B***, attached hereto.

* a/k/a John R. Perdian

JURISDICTION

The Judgment of the Supreme Court of Louisiana as it pertains to Petitioners was entered on December 13, 1979, and a timely Petition for Rehearing was denied on January 28, 1980. Petitioners sought and obtained from this Honorable Court an Order extending the time to file a Petition for a Writ of Certiorari to and through June 26, 1980. (See *Appendix C*, attached hereto).

Jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3), Petitioners having asserted below and they assert in this Court deprivation of rights secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Whether the lower Courts erred in concluding that persons residing in a rural community whose property included cultivated farm land lack a reasonable expectation that Federal and State Law Enforcement Officers will not, in the nighttime, surreptitiously, trespass upon their land and observe activities in the yard and driveway of their private residence from the cultivated protions of that private property and driveway.

2. Whether the lower Courts erred in their analysis of "curtilage", in their conclusion that the concept of "curtilage" was controlling in a determination of Petitioners' "zone of privacy", and in their conclusion that the observed activities of Petitioners were outside of the "cutilage" surrounding their residence.

3. Whether the lower Courts erred in their finding that the officers comprising the Federal - State Task Force, hidden on private property owned by Petitioners, had probable cause sufficient to justify their warrantless seizure of vehicles also

located on private property and to justify ultimate warrantless search of those vehicles.

4. Whether the lower Courts erred in finding that the warrant requirement of the Constitution of the United States was not violated when law enforcement officers: a) ***seized*** and b) ***searched*** trucks located on private property when there was no indication that the vehicles were immediately to be moved and when law enforcement officers were available and had more than adequate time and facilities to obtain a warrant prior to movement or to stop the vehicles if they were placed in motion before ever reaching public highways.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Amendments to the Constitution of the United States:

Amendment IV.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV. Section 1.

> "All persons born or naturalized in the United States. and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any

person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the following provisions of the Constitution of the State of Louisiana of 1974:

Article 1, Section 2

DUE PROCESS OF LAW

"No person shall be deprived of life, liberty, or property, except by due process of law."

Article 1, Section 5

RIGHT TO PRIVACY

"Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy. No Warrants shall issue without probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate Court."

This case also involves the following Federal Rule of Criminal Procedure:

Rule 41

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. - A search warrant authorized

by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized with a Warrant. - A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit.- A warrant other then a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place

named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) **Warrant upon oral testimony.**-

(A) General Rule.- If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application.-The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance.- If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate sahll order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immidiately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony.- When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a bsis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. -The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution. -The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded. -Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the Judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1989, affirming the conviction of Petitioners, JEFF H. DUPUIS, BERNIS H. DAVISON, JOHN ZERBE, and WILBUR L. SMITH.

Petitioners, with others, were charged by Bill of Information with Possession of Marijuana with Intent to Distribute, a violation of Louisiana Revised Statutes 40:966 (a). The charge resulted from a warrantless seizure and search of trucks located on private property owned by Petitioners, JEFF H. DUPUIS and BERNIS H. DAVISON. The seizure and search was carried out by a joint task force consisting of United States Government Agents and Louisiana State Police, which operation was under the primary control of agents of the United States Government.

The Petitioners filed a Motion to Suppress Evidence attacking the seizure and search. An Evidentiary Hearing was commenced on December 12, 1978, and was concluded on December 15, 1978. That Hearing revealed the following:

On June 15, 1978, at approximately 3:00 o'clock, P.M., a joint task force of the United States Customs Air Officers and Louisiana State Police commenced a surveillance of a rural residential compound, including a house and mobile home, which is the home of the families of Petitioners, JEFF H. DUPUIS and BERNIS H. DAVISON. Dupuis lives in the house with his wife and their children and grandfather, and Davison and his wife live in the mobile home near the Dupuis house. This residential compound, including its environs, is bounded on the west by Louisiana State Highway 349; on the north by the Parish Road; and on the east and south by the edge of plowed fields of growing sugar cane. The field to the south is included in the Dupuis property. (Transcript, Pages 500 - 503; 506 - 510; 519; 520; 522; 523; 529; 537; Exhibits S -1, D - 5,

6, 7, 16, 17, 18, 18A). *

The daylight activities of the joint governmental task force were limited to "roving surveillance" from vehicles operating on the two public highways which formed the north and west borders of the Dupuis property. The roving surveillance consis ted of officers driving by the property to briefly observe what, if any, activity was taking place. (Transcript, Pages 343 - 345; 565; 647; 648; 668).

About 7:30 P.M., as darkness fell, United States Customs Air Officer Wade and Louisiana State Trooper LeJeune Proceeded together on foot from the Parish Road which was the north boundary of the Dupuis property through the sugar cane and surreptitiously secreted themselves in the cane field immediately south of the Dupuis residence. The law enforcement officers moved about within the Dupuis property from time to time. (Transcript, Pages 432; 437; 439; 443 - 448; 451; 475; 567; 568; 572; 577; 578; 593; 594; 595; 641; 642).

The outer boundaries of the Dupuis property were clearly defined by a gully on the south, the Parish Road on the north and a fence along Highway 349 on the west side. (Transcript, Pages 439; 443 - 446; 520; 522; 532; 534 - 535; 541 - 542; 577; 578; 593 - 595). Officers testified that at all times their on - foot surveillance activities were conducted from within these boundaries, but they indicated that they were not at all concerned with the possibility of being on private property or on the Dupuis property. While the officers were generally located approximately 25 to 40 yards south of the Dupuis house, at least once, Louisiana State Police Officer LeJeune crept to the edge of the cane, approximately ten (10) yards from the house. (Transcript, Pages 380 - 382; 439; 443 - 446; 446 - 448; 475; 532; 534 - 535; 541 - 542; 567; 568; 572; 577 - 579; 593; 595; 607 - 608; 641 - 642).

During the evening, Officers Wade and LeJeune observed

the Petitioners having a barbeque in the Dupuis' back yard. Meanwhile, three (3) trucks, an 18 wheel trailer and two (2) Bobtail trucks, remained stationary within the Dupuis family residential compound. (Transcript, Pages 451; 482; 567).

At some time betweem 11:15 and 11:30 P.M., Officers Wade and LeJeune observed the barbeque come to an end and the light in the barbeque area go out. Shortly thereafter, a car drove into the driveway. Then, the Officers heard the refrigeration unit on the 18 wheel trailer go off. At that time, through the use of infra-red and star light night viewing equipment, the Officers observed various persons, who could not be identified, approached the truck. Thereafter, the 18 wheel trailer was moved a distance of approximately 3 to 4 feet and parked on the shell driveway. One of the Bobtail trucks was then backed up to the rear of the 18 wheel trailer. Officer Wade testified that at that time, when the rear doors of the 18 wheel trailer were opended to allow the Bobtail truck to be backed flush to the trailer, he saw large bales of an unknown substance inside the trailer which he immediately assumed to be marijuana. He advised his superior, Customs Air Officer Joachim, by radio, that he saw "large bales". Officer Wade begrudgingly admitted that he could not confirm, by any objective standard, his suspicion that the bales contained marijuana. Officer Wade failed to detect the telltale odor of Marijuana, notwithstanding the fact that the refrigeration equipment on the trailer was off, which, if on, would have diminished any such odor. Officer Wade further admitted that he failed to observe inside any of the bales and saw no gleanings of marijuana or other green vegetable matter, even with the use of his sophisticated visual aids. Finally, Officer Wade admitted that he could not discern the wrappings on the bales, but based his suspicions on their shape and size which subsequently he admitted were identical to commercially purchased bales of peat moss. Officer Wade admitted that because of his pre-conceived suspicions, he expected to see marijuana when the bales were

opened. (Transcript, Pages 470 - 484).

Officer LeJeune, the other officer conducting the onsite surveillance, indicated that the bales were not observed until the first Bobtail truck was pulling away from the 18 wheel trailer after having been unloaded. Officer LeJeune also acknowledged that he failed to smell the odor of marijuana, see inside the bales or detect the presence of marijuana gleanings or other green vegetable matter. Officer LeJeune admitted that since he was expecting the substance to be marijuana, he did not pause to consider whether the packages might have contained anything else. Transcript, pages 570; 578; 584; 585; 590).

A United States Customs Air Officer (Joachim) contacted United States Magistrate Herbert for the purpose of obtaining a Telephonic Search Warrant, in accordance with Federal Rules of Criminal Procedure 41 (c) (2). The State conceded, however, that the issues to be presented to the Court at the Hearing on the Motion to Suppress Evidence involved a warrantless search because the "Affidavit" presented to the Magistrate for the purpose of obtaining that Warrant contained undisclosed hearsay and speculation, not revealed to the Magistrate, (Transcript, Pages 349, 350, 351, 352, 353, 357, 358 - 360; 415; 419; 422 - 424; 426 - 428 and further contained out - and - out false statements (Transcript, Pages 347; 361; 362; 382; 478; 488) Additionally, the Magistrate and requesting officers totally failed to comply with the requirements of Rule 41 (c) (2) of the Federal Rules of Criminal Procedure. (Transcript, Pages 195 - 198; 330; 331; 366; 374; and 375). In addition, the United States Magistrate in question admitted during a Hearing on the Motion to Suppress Evidence that the Search Warrant itself was substantially altered several hours after it had been issued and executed upon by expanding the description of the premises to be searched and inserting the words, "the vehicles located" and further by adding a description of property to be searched for with the words, "or other contraband." (trans-

cript, Pages 306 -309).

The Trial Court declined to invalidate the seizure and search and denied Petitioners' Motion to Suppress Evidence. (Transcript, Pages 745 - 764). Thereafter, Petitioners entered pleas of guilty as charged, with reservation of their rights to appeal the Trial Court's denial of their Motion to Suppress Evidence. (Transcript, Pages 766 - 797). As a result of those pleas, the Trial Court sentenced each of the Petitioners to pay fines of FIFTEEN THOUSAND ($15,000.00) DOLLARS, plus Court costs, and in default in payment of said fines, to serve TWO (2) YEARS at hard labor with the Louisiana Department of Corrections and futher that they be sentenced each to serve a term of THREE (3) YEARS at hard labor with the Louisiana Department of Corrections. (Transcript, Page 797).

Petitioners unsuccessfully appealed their conviction and the refusal of the Trial Court to uphold their Motion to Suppress Evidence to the Louisiana Supreme Court.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

I.

Prior to Trial, Petitioners moved to suppress the evidence seized, and they based that motion upon the Fourth Amendment to the United States Constitution.

II.

As a basis for Petitioners' Motion to Suppress Evidence, they contended that as residents in a rural community with property including cultivated farm land, they had a reasonable expectation that Federal and State Law Enforcement Officers would not, in the nighttime, surreptitiously, trespass upon their property and observe their activities in the yard and driveway of their private residence, from cultivated protions

of their private property and driveway, and they contended that these activities were direct violations of their rights as guaranteed by the Fourth Amendement to the Constitution.

III.

In the Courts below, petitioners contended that the concept of "curtilage" is no longer controlling in a termination of Petitioners' "zone of privacy" as protected by the Fourth Amendment to the United States Constitution and they further contended that, nevertheless, the activities in which Petitioners were engaged and which law enforcement officers observed from Petitioners' private property were conducted from within a Constitutionally protected "zone of privacy".

IV.

In the Courts below, Petitioners contended that the Fourth Amendment to the United States Constitution was violated by law enforcement officers in the conduct of a warrantless seizure and search of trucks located on private property when there was no indication that the vehicles were immidiately to be moved and when law enforcement officers were available and had more than adequate time and facilities to obtain a Warrant prior to the movement or stop the vehicles if they were placed in motion before ever reaching public highways.

V.

In the Courts below, Petitioners contended that Federal and State Law Enforcement Officers lacked the "probable cause" required by the Fourth Amendment to the United States Constitution for the conduct of a seizure and search upon Petitioners' private property.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. This Court should grant Certiorari to consider whether persons residing in a rural community, whose property includes cultivated farm land, have a reasonable expectation that Federal and State Law Enforcement Officers will not, in the nighttime, surreptitiously, trespass and observe activity in the yard and driveway of that private residence from cultivated portions of that private property and driveway, and whether such activities on the part of Federal and State Law Enforcement Officers constitute a direct violation of Fourth Amendment Rights.

In ***Rakas v. Illinois***, 439 U.S. 128; 99 S. Ct. 421; 58 L. Ed. 2d 387 (1962), this Honorable Court discussed the "legitimate expectations of privacy" and the manner in which they must be defined. At footnote 12, 99 S. Ct. at 430, Justice Rehnquist, in effect, explained that the notion of private property rights is not dead in an inquiry as to expectations of privacy. At 99 S. Ct. 431, footnote 12, Justice Rehnquist declared:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blakstone, Commentaries, Book II Ch. I and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. . .
>
> But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.

A search conducted without a Warrant, as in the case before this Court, is, ***per se***, unreasonable, under the Fourth Amendment to the United States Constitution, subject only to a few specifically established and well-delineated exceptions. ***Coolidge v. New Hampshire***, 403 U.S. 443, 454 - 455 (1971), 91 S. Ct. 2022; 29 L. Ed. 2d 564. It is fundamental that observations made by law enforcement officers which form the basis of a seizure and search must be made by officers who have a right to be where they are. ***Coolidge v. New Hampshire, Supra. United States v. Johnson***, 541 F.2d 1311, 1316 (8th Cir., 1976); ***United States v. Bradshaw***, 490 F.2d 1097, 1100 (4th Cir., 1974). In ***Katz v. United States***, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), this Court defined unlawful Fourth Amendment intrusion. This Court proclaimed a "zone of privacy" within which a citizen has a reasonable expectation of privacy. If a government agent has intruded into a person's "zone of privacy", such intrusion must have been justified by a "warrant for another object, hot pursuit, a search incident to a lawful arrest, or some other legitimate reason for being present, unconnected with a search directed against the accused." Otherwise, the results of the search ***do not*** fall within any legitimate exception. ***Coolidge***, 403 U.S. at 446.

That an unjustified ***visual*** intrusion into the zone of privacy violates the Fourth Amendment is well settled in the Fifth Circuit. ***Texas v. Gonzales***, 388 F.2d 145 (5th Cir., 1968); ***Brock v. United States***, 223 F.2d 681 (5th Cir., 1955). In ***Rakas, Supra***, this Court has clearly established that concepts of property ownership and control continue to weigh heavily in a determination of the "zone of privacy" described in ***Katz***. See 439 U.S. at 143 and 144, footnote 12. The facts before this Court reveal that the "zone of privacy" which was violated consisted both in the location and circumstances of the trucks and in the location and the circumstances of the officers making observations.

In the case before this Court, Petitioners exhibited a reasonable expectation of privacy by conducting their activities behind their residence, on their private driveway, away from public roads, within closed trucks, and in a manner which permitted no observation except by someone crawling through a sugar cane field (three feet high) owned by one of the Defendants under the cover of darkness. Such "gymnastics" as described by these officers in order to observe the Defendants have been disapproved by the Supreme Court of the State of Louisiana in such cases as ***State v. Lamartiniere***, 362 So. 2d 526 (La., 1978).

The simple and bold fact remains that the officers conducting the surveillance in question had no right to be where they were. The Supreme Court of Louisiana, in the instant case, has recognized that the officers were, in fact, trespassing upon private property owned by Petitioners. ***State v. Dupuis***, 378 So. 2d at 837).

The effect of the ruling of the Louisiana Supreme Court in the instant case would be to give to owners of rural property no expectation of privacy at all, if they happen to grow sugar cane, or some other crop adjacent to the land upon which their actual residence is located. It must be remembered that the observations which were conducted here were absolutely surreptitious in nature, carried out in total blackness, and aided by the use of sophisticated night viewing equipment. ***State v. Dupuis***, 378 So.2d at 937). It is suggested that one has an even greater right to expect privacy and to expect that persons will not be trespassing in his fields at night than he does during the daytime.

In ***United States v. David*** 423 F.2d 974 (5th Cir., 1970), the Court held:

> Many cases involving the 'plain view doctrine' concern evidence recovered from automobiles located in ***public*** places. The rule lends itself to application in these situations because the observing officer is not required to trespass on private property in order to have a clear view of the articles inside the automobile. (Cites omitted). However, where police officers trespass in ***order to secure the view,*** we have not hesitated to find a search.

The foregoing language was cited approvingly in ***United States v. Holmes***, 521 F.2d 859 (5th Cir., 1975), where the Court ruled that "when a law enforcement agent trespasses solely to unearth evidence of a crime, he has no 'right to be in the position to have that view". *Id.* 869. In that case, as in the case here, the agent making the observation "admitted that his sole purpose in getting close enough to peer into the (object of the search) was to look for marijuana."

In the case at bar, surveilling officers were neither in an unprotected area nor in a protected area with prior justification. Whether they were on the Dupuis property (as they admittedly were), or on someone else's property without permission, they acknowledged that they recognized that they were on ***private property*** and that they had no permission to be there. Thus, they had no prior justification to be where they were and their threshold instrusion did not meet any legitimate tests.

The ***Holmes*** case, ***Supra,*** also dealt with another issue squarely on all fours with the case at bar. In that case, the government, while recognizing that an examination of property rights is relevant to the determination of privacy interests, argued, as the Trial Court in the instant case held, that the Defendants had exhibited no reasonable expectation of privacy because

"no fences enclose any part of the property, and no 'no trespassing' signs were posted, and there was not proof of special attempts to conceal the marijuana from any 'passerby'". *Id.* at 869, 870. The Court of Appeals responded as follows:

> The government would have us ignore the character of the (Defendants) property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth, need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away. *Id.* at 870.

See also *Brock v. United States*, 223 F.2d 681 (5th Cir., 1955). The decision of the lower Courts in the instant case can lead only to the conclusion that a rural dweller is afforded less Constitutional protections for his zone of privacy than an urban dweller.

The logic of the *Holmes* rationale as given above, was recognized in *Phelan v. Superior Court of Mariposa County*, 151 Cal. Rptr., 599, 603 (Ct. App. 1979) where a California Court emphatically stated, "Nor does the absence of boundary fences or 'no trespass' signs of itself negate Petitioner's objective expectations of privacy." It cannot be said, therefore, that Petitioners did not display a reasonable expectation of privacy which was improperly violated by the instant search.

Moveover, when a "plain view" of evidence is obtained during an unlawful search, the "plain view" doctrine can never be used to justify the seizure of that evidence. *State v. Watkins*, 237 N.W. 2d 14 (S.D. 1975); *Commonwealth v. Myers*, 361

A 2d 884 (Pa. 1976). For law enforcement officers to see contraband from a place where they have a right to be, the initial intrusion must have been lawful and legitimate. ***People v. Walker***, 64 Mich. App. 138, 235 N.W. 2d 85 (1975); ***In Re Brewer***, 24 Ill. App. 3rd 330, 320 N.E. 2d 340 (1974). The following language is pertinent:

> "We believe that where the centry onto premises on the part of a law enforcement officer is illegal ***ab initio***, we cannot apply the plain view doctrine . . . It is well established that an unlawful search upon an illegal entry cannot be justified by what is found in the search, (citation omitted) and it seems reasonable that this rationale should also be applied to the plain view doctrine. In other words, the plain view doctrine was not applicable unless (the officer) was on a part of the premises to which the general public was allowed access. Such was not the case . . . The record revealed that the premises were not public in nature and the State has failed to make a showing that the situation was of such emergency nature as to excuse the procurement of a search warrant. ***People v. Clark Memorial Home***, 114 Ill. App. 2d 249, 252 N.E. 2d 546, 548 (1969).

In a New York case, the Court recited the lack of exigencies to justify a police investigator's surveillance without a warrant. There, as here, the enforcement officer's entry onto the premises was not incident to a lawful arrest. Nor was he engaged in hot pursuit or motivated by the need to prevent loss of evidence:

> But having failed to obtain a warrant where no exigent circumstances were present, the investigator's position

> in the defendant's back yard was unlawful, thereby rendering his "Plain view" constitutionally infirm. ***People v. Abruzzi***, 52 A.D. 2d 499, 385 N.Y.S. 2d 94, 97 (App. Div. 1976).

In ***Abruzzi***, the police investigator, without a warrant, positioned himself in a doctor's back yard where he could observe an undercover policewoman in an examining room or a doctor who was suspected of committing sexual misconduct with female patients. Quite unexpectedly, the investigator observed the doctor with a female patient in another examining room, which led to the doctor's conviction of sexual abuse in the first degree. The ***Abruzzi*** Court concluded that, granted such initial illegality, all the fruits of the search must be suppressed:

> In applying these maxims to the appeal at bar, we hold that the independent act of the defendant in engaging in a course of criminal conduct not anticipated by the trespassing investigator, is out-weighed by the severity of the constitutional violation inherent in the initial abuse of the defendant's reasonable expectation of privacy. (Cf. ***Katz v. United States, Supra.***) This kind of search conducted by the police investigator without a warrant, must be declared to be invalid in all respects. 385 N.Y.S. 2d at 97.

In the case at bar, it cannot be said that the Petitioners did not display reasonable expectation of privacy which was improperly violated by this visual search.

The actions of law enforcement officers cannot be justified on the contention that the Petitioners "knowingly exposed" their trucks to public view. A private residence, within an open field, is similarly "exposed to public view" but the location of that residence does not permit a visual entry ***into***

the residence under any doctrine. Here, the presence of closed vehicles does not justify a similar visual intrusion into the interior of the trucks, a Constitutionally protected area.

It cannot be suggested that Petitioners "knowingly exposed" the contents of the enclosed trucks to "public view". It is clear that only a limited glimpse or view of the interior of these trucks was acquired, and that was accomplished only through the highly secretive and sophisticated efforts of Federal and State Narcotics Officers, hidden on private property with no prior justification. (Transcript, Pages 432; 437; 439; 443 - 448; 451; 475; 567; 568; 572; 577; 578; 593; 594; 595; 641; 642.)

Nor can it be contended that officers might just as well have set up their night time observation of the three trucks from any of the public roads in the vicinity. Such a contention does not in any way justify the establishment of surveillance by those officers from private property without prior justification. Moreover, had the officers conducted their surveillance from public roads, they could not have seen into the interior of the trucks. There was no contention made and, indeed, the record completely negates the idea that the contents of the trucks in question could have been observed from any public road in the vicinity. As a matter of fact, an examination of the photographs and exhibits in the record of this proceeding will clearly indicate that such observations would have been impossible. The fact that the surveilling officers were required to move to within fifteen or twenty ywrds of the trucks in order to confirm their sighting corroborates the conclusion that they were not mere "inadvertent" visual sightings.

The mere ability to observe the presence of closed vehicles in a private driveway from a public road does not justify surrepti-

tious visual intrusion within the inside of those vehicles. It is apparent that the officers in question were not content to continue the "drive-by" of the premises or to conduct periodic overflights of the area. If the sole purpose of the observations by government agents was to determine when and where the vheicles would head, it is apparent that such "drive-bys" and overflights, coupled with the admitted presence of a multitude of police officers securing every road leading from the premises, were more than ample to accomplish that limited purpose. Instead, a special team of Federal and State officers secreted themselves on private property, within a few yards of the residence and the trucks parked on a private driveway, and conducted an intensive visual search of the area and of the interior of the trucks, utilizing sophisticated night viewing equipment, binoculars, etc. A claim that these activities were aimed solely at detecting movement of the vehicles in question is specious and should be summarily rejected.

The mere existence of an object in "plain view" does not, by itself, justify its seizure without a Search Warrant, absent the narrow exceptions established by jurisprudence. That the police officers who conducted the search under attack in the instant case completely ignored that principle is evident in the following statement by Trooper Trahan, in charge of the joint operation for the State of Louisiana, appearing at Page 632 of the Transcript:

> A. Well, when I had that information there, I told Rick -- I said, 'let's hit them.' He said, 'Well, no, let's get a warrant.' I said, 'We don't need a warrant. We got all the probable cause in the world. You got two agents setting in the field; you've got plain view; they saw the bales in the truck; they heard the bales being set on the surveyor. We don't need no search warrant . . '

Nor can the "open field" exception justify this initial warrantless search. This doctrine was first enunciated in ***Hester v. United States***, 265 U.S. 57, 44 S. Ct. 445, 68 L.Ed. 897 (1924) in which revenue officers examined abandoned moonshine jugs on the land of the father of defendant. Recent cases have held ***Hester*** to be inapplicable in light of ***Katz v. United States, Supra*** and instead have resolved the question, not on strict property issues, but instead upon the "reasonable expectation of privacy". Cf. ***Patler v. Slayton,*** 503 F.2d 472, 477 (4th Cir. 1974); ***United States v. Perez,*** 440 F. Supp. 272, 287 (Ohio, 1977); ***United States v. Freie,*** 545 ; F.2d 1217, 1223 (9th Cir. 1976); ***State v. Byers***, 359 So. 2d 84 (La. 1978). As indicated in ***Freie,*** "Hester no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy." 545 F.2d at 1223.

These Petitioners had not abandoned marijuana in the middle of an unattended, uncultivated open field. Instead, their activities were being conducted in complete privacy, within enclosures which one could reasonably expect to exclude scrutiny by the average "passer-by". Thus the ***Hester*** exception is totally inapplicable. Even if the pre-***Katz*** notion of "open fields" were applied, that doctrine has never authorized an intrusion into a protected area (in this case, the Petitioners' driveway). Instead, in all of the traditional "open fields" cases, the objects searched were actually in anopen field. Cf. ***United States v. Brown,*** 473 F.2d 952 (5th Cir., 1973) and ***United States v. Hollon***, 420 F.2d 302 (5th Cir., 1970), both cited by the Trial Court in support of its ruling in the instant case.

Here, Petitioners conducted their activities behind their residence so that they could not be observed from the public road and with full and reasonable expectations of privacy. Considering the Petitioners were on a tract of land owned by them and out of view of public roads, there is nothing more that they could have accomplished to maintain the privacy of their activities, under the circumstances.

In ***Olmstead v. United States***, 277 U.S. 438 (1928). the Supreme Court set forth the trespass doctrine as a triggering device for Fourth Amendment protection. Some years later, the Court "began to move away from basing its decisions on the protection of privacy was at the heart of the Fourth Amendment's proscriptions. Miraldi, ***The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States,*** 38 Ohio St. Law J. 709, 711 (1977). This movement culminated with the *Katz* decision in 1967. The current two-prong test for Fourth Amendment protection was set forth in Justice Harlan's concurring opinion in *Katz*:

> (F) irst . . . a person (must) have exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation (must) be one that society is prepared to recognize as "reasonable". 389 U.S. at 361.

Although some decisions have implied that *Katz* overruled the trespass doctrine, that conclusion is in error, as has been noted by this Honorable Court in Footnote 12, ***Rakas, Supra.*** As the Sixth Circuit declared in ***United States v. Carriger,*** 541 F.2d 545, 550 (6th Cir., 1976):

> "We believe that the Supreme Court's determination that the "trespass" doctrine could "no longer be regarded as controlling" was intended to expand the pro-

> tection afforded by the Fourth Amendment. Certainly, that was the effect in *Katz* where the Court found an illegal search and seizure even though no trespass was committed by FBI agents. Accordingly, we are of the view that *Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the government that may violate a person's reasonable expectation of privacy. Although we do not hold today that any evidence gained as a result of a federal agent's trespass constitutes an illegal search and seizure, we believe it is helpful to rely on property concepts "simply because they assist in establishing the perimeters of the Fourth Amendment guarantees as they relate to the home." *Fixel v. Wainwright*, 492 F.2d 480, 483, n. 3 (5th Cir. 1974).

Under this analysis, it is manifestly clear that an illegal search and seizure was committed in the case at bar. Petitioners' reasonable expectation of privacy is clearly violated by the tresspassing of the law enforcement authorities upon the private property of one of the Petitioners. Officers secreted themselves within a few yards of Petitioners' residence and their trucks which were parked on their private driveway. From there, these officers conducted an intensive visual search of the area and of the interior of the trucks, using sophisticated night-viewing equipment.

Nor can this intrusion be excused as a mere "technical trespass" under any of the meanings of that term:

> First, a trespass may be technical if the officer has moved only a short distance from a place in which he has a right to be. Second, a trespass may be techni-

> cal if the defendant fails to take precautions to make the premises private. Third, if the officer could have seen the incriminating evidence equally well from a place where he had a right to make a view, the trespass is technical. 38 Ohio St. Law J. 709, 721 - 722 (1977).

In the instant case, officers had penetrated the Dupuis property and advanced as close to the residential compound as possible; the Petitioners took all possible precautions to keep their activities private, and the view of the incriminating evidence could not have been attained from the private road, which is the only place where the officers had a right to be.

The Fifth Circuit has sustained the validity of the trespass doctrine in ***United States v. Davis***, 423 F.2d 974 (5th Cir., 1970), Cert. Denied, 400 U.S. 836 (1970), a post- ***Katz*** decision. See also ***Fixel v. Wainwright***, 492 F.2d 480 (5th Cir., 1974) where the trespass doctrine was applied to the common fenced - in backyard of a four unit apartment complex. Both decisions stressed the sanctity of the home and the right to be left alone.

The most recent expression of this Court's vigorous protection of the sanctity of the home and private property appears in ***Payton v. New York***, (No. 78-5420) (1980) and ***Riddick v. New York***, (No. 78-5421) (1980) in which it has held that the Fourth Amendment to the United States Constitution prohibits law enforcement officers from making warrantless and nonconsensual entries into a home in order to accomplish an arrest, even where probable cause exists, absent an emergency situation. The language of Justice Stevens, speaking for the majority of the Court, reaffirms this Court's reverence for the sanctity of the home. Petitioners submit that that sanctity extends to all of the private property which a rural

dweller calls his "home", as in the case at bar.

It has been explained in 38 Ohio St. Law J. at 729, that "if, . . . the officer entered the property looking solely for evidence of crime, then the officer's presence constitutes a search within the proscription of the Fourth Amendment." Citing ***United States v. Holmes***, 521 F.2d 859 (5th Cir., 1975). This situation describes the facts of the case at bar. Officers herein secreted themselves on Petitioner Dupuis' property to watch of evidence of crime, a clear violation of the Fourth Amendment ot the United States Constitution.

Petitioners had a reasonable expectation of privacy extending beyond the driveway and into the sugar cane fields. It is patently illogical to conclude that where the plowed fields began, Petitioners' expectation of privacy ended, when they were inside a privately owned truck located on a private driveway, just a few feet from the edge of the privately owned sugar cane field, forming a part of the total residential compound owned by Petitioners. As stated in ***People v. Weisenberger*** 216 P. 2d 1128 (Col. 1973):

> "Even though the area of the search might have been outside the curtilage, nevertheless, if it was a place where the owner had a reasonable expectation of privacy, then it was a constitutionally protected area where warrantless intrusions are forbidden under the federal and state constitutions." 516 P. 2d at 1129.

Accordingly, the Fourth Amendment protection extends to all of defendants' property. In the case at bar, Petitioners also demonstrated a reasonable, justifiable expectation of privacy within the rural Dupuis porperty. They, further, had taken deliberate measures to ensure that their activities were pro-

tected from detection by other persons by positioning the trucks behind the residence, in such manner that no one on the public road could observe the loading and unloading. Because the evidence is the fruit of the unlawful search, it should properly have been suppressed.

To the same effect is ***Phelan v. Superior Court of Mariposa County***, 151 Cal. Rptr. 599 (Ct. App. 1979). There, the Defendants cultivated a marijuana garden in an isolated narrow ravine on foothill property they owned. The garden was protected in part by trees, in part by a chicken wire fence laced with tree branches and shrubs, and by large rocks which made a natural barrier on one side. Sheriff's officers engaged in surveillance of the property and, from a vantage point atop a rocky knob on the side of the hill, spotted the garden. Officers verified their suspicions that the plants were marijuana with the aid of binoculars. Officers continued their surveillance on later dates and the defendants were subsequently arrested for cultivation of marujuana. The warrantless search was held to violate defendants' subjective and objectively reasonable expectation of privacy:

> "However, since petitioners took reasonable steps to enclose their garden from the observation of others, they echibited such a claim of privacy. That the enclosure did not totally conceal the plants does not foreclose a reasonable expectation of privacy; otherwise, any discovery resulting from an officer's exploratory search would be lawful regardless of how flagrant or purposeful the trespass. Only reasonable efforts to secure privacy under all of the circumstances are required.

* * * * *

> As we have explained, the inquiry is not whether the officers have violated a particular boundary line in their searching but whether they have invaded the defendants' reasonable, exhibited expectation of privacy. (Citation omitted). The expectation of privacy defines the parameters of the right to search. (Citation omitted). While the possessor of unfenced rural property should anticipate the presence of occasional trespassers, the lack of boundary fences alone does not foreclose a reasonable expectation of privacy as to a particular area on the land such as the ravine, and enclosed garden in the present case. We perceive no difference between fenced land and open land having a particular enclosed area, insofar as the Fourth Amendment is concerned. 151 Cal. Rptr. at 604, 606."

It is also interesting to note the Court's footnote on Page 606 to the effect that " . . there is no basis for anticipating the presence of police officers engaging in an exploratory search for marijuana." The Court concluded, as Petitioners respectfully contend this Court should conclude:

> "By electing to engage in a surreptitious surveillance from the adjoining owner's property, the officers assumed the risk of intruding into petitioners' constitutionally protected area of privacy. Having done so, the search was illegal, regardless of the officers' good faith." 151 Cal. Rpt. at 606.

See also ***State v. Wert***, 550 S.W. 2d 1, and ***People v. Fly***, 34 Cal. App. 3d 665, 110 Cal. Rptr. 158 (1973).

Similarly, where the sheriff flew a helicopter over the defendant's back yard to search out marijuana plants which

were not visible from the road, defendant's conviction for unlawful cultivation was reversed. The helicopter observation amounted to a search without a warrant and an "unreasonable governmental intrusion into the serenity and privacy of his back yard" which could not be justified under theplain view doctrine. ***People v. Sneed***, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146, 151 (1973). The helicopter was "a seeking out, manifestly in nature", just as was the search here.

Of additional pertinence here is the case of ***Lorenzana v. Superior Court of Los Angeles County***, 9 Cal. App. 3d 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973). There, the California Supreme Court appears to equate unreasonableness with ***any*** police intrusion into a citizen's right of privacy:

> "We now recognize the constitutional encasement which renders inviolable the individual's reasonable expectation of privacy; any governmental intrusion into that privacy is an "unreasonable search" within the meaning of the Fourth Amendment, whether that intrusion be the traditional physical search (citation omitted) or a surreptitious auditory invasion (citations omitted) or, indeed, visual intrusion." 511 P. 2d at 42.

The need for additional clarification of ***Rakas v. Illinois***, Supra, is apparent from a consideration of decisions from other circuits. In ***United States v. Vicknair***, 610 F.2d 372 (5th Cir., 1980). Judge Rubin, at Page 377, explained that:

> A search need not be clandestine to be unlawful. The police crossed the premises with the admittedly illegal purpose of searching the Sky Top II'. If that is not enough to infect the entire entry, their entry onto the

> enclosed area of the premises and their attempts to observe the interior of the house through closed and shuttered windows belies the assertion that their sole purpose was to locate the owner of the premises . . . the parade of a uniformed officer and marked police cars does not mask the background of invalid purpose.

Judge Rubin also declared, at Page 377, that:

> The police excursion onto the private premises at 9330 Balada, however, was neither entirely innocent nor within the scope of ordinary police routine. The police suspected that the house and the boat were being used for marujuana smuggling. Their visit was to confirm those suspicions.

In *Vicknair*, the government had contended that because a marked police car had been in the area and because a police officer had openly attempted to arouse occupants of the house by knocking and because there was no "clandestine or surreptitious behavior", the technically illegal trespass was of no consequence. In response, Judge Rubin stated, "Such threads of distinction weave too fine a cloth to cover the unconstitutionality of the entry." Judge Rubin also declared,

> A Defendant's attempts to maintain his privacy, ***see United States v. Chadwick***, 1977, 493 U.S. 1, 11, 97 S. Ct. 2476, 2483, 53 L. Ed. 2d 538, 548; ***Katz v. United States***, 1967, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 581, and his use of an area, ***See Jones v. United States***, 1960, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; ***United States v. Britt***, 5 Cir. 1975, 508 F.2d 1052, 1055, ***Cert Denied*** 423 U. S. 825, 96 S. Ct. 40, 46 L. Ed. 2d 42, are both rele-

vant considerations that may establish the existence of a privacy interest even absent property rights in the area. See ***Rakas v. Illinois,*** 1978, 439 U.S. 128, 150, 99 S. Ct. 421, 435, 58 L. Ed. 387, 405 (Powell, J., concurring).

In ***United States v. Rios***, 611 F.2d 1335 (10th Cir., 1979). the Court analyzed considerations pertinent to determining Fourth Amendment rights. That Court indicated that a showing that a person who owned specific premises "took normal percautions to maintain his privacy - that is, precautions customarily taken by those seeking privacy" would bear upon the Fourth Amendment right to privacy. The Court cited ***Rakas v. Illinois***, 439 U.S. at Page 152. (611 F.2d at 1345).

It is submitted to this Court that it is most appropriate at this time for the highest Court of the land to grant the Writs requested herein in order to fully clarify and delineate the parameters being drawn in ***Rakas.*** In ***Rakas,*** this Court has begun a meaningful journey on the road to practically and fully defining the "privacy interests" protected by the Fourth Amendment to the United States Constitution. In the case at bar, this Court has before it the perfect vehicle to continue that journey toward its ultimate goal.

II. This Court should grant Certiorari to consider whether the analysis of "curtilage", by the lower Courts in their conclusion that the concept of "curtilage" was controlling in a determination of Petitioners' "zone of privacy," and in their conclusion that the observed activities of Petitioners were outside of the "curtilage" surrounding their residence was erroneous and in violation of the rights of privacy guaranteed to Petitioners by the Fourth Amendment to the United States Constitution.

The antiquated "curtilage" distinction is not wholly valid, after this Court's decision in ***Katz, Supra***. The comments of this Court in ***Rakas, Supra***, call for a re-evaluation and clarification of the apparent rejection of "curtilage" which appears in ***Katz***.

The Louisiana Supreme Court, in the case at bar, apparently erroneously relied on the "curtilage" doctrine. ***State v. Dupuis***, 378 So. 2d at 937. The contention that the private shell driveway upon which the trucks were parked was "outside of" Petitioners' "curtilage" is simply without merit. This claim just not supported by the record. A reading of the record will reveal that the trucks were located on a private shell driveday in the midst of a tract of land comprising the Dupuis-Davison residence. That tract of land contained two (2) domiciles. The private shell drive was obviously a part of the two residences and their environs. The testimony presented during the Hearing substantiates that conclusion.

Historically, a person may reasonably expect privacy within his home and the area surrounding it and he may expect to be safe from warrantless intrusion therein. ***United States v. Davis***, 423 F.2d 974 (5th Cir., 1970). He may also expect to be free from visual intrusion into that area. In the case at bar, as the Trial Court correctly held, the trucks which were searched were certainly within the environs of the Dupuis family compound. They were on a private shell driveway used by the Dupuis and Davison families and their guests only. Along the side of that driveway, right at the edge of the cane field where officers lay hidden, was a bicycle, presumably belonging to one of the Petitioners' children. Around and outside the driveway was a carefully mowed area of grass which was maintained by Petitioners and which contrasted sharply to the plowed and planted sugar cane fields. (Transcript, Pages

502, 503, 520, 522, 532, 577 - 579, 593 - 595).

For a recent and pertinent analysis of "curtilage", the Court's attention is invited to ***United States ex rel Saiken v. Bensinger***, 546 F. 2d 1292 (7th Cir. 1976). That Court examined the decisions of several Courts of several jurisdictions in an attempt to establish whether the case law had set forth a standard for determining how far "curtilage" may extend from a person's residence. It was held that prior case law had displayed "a perfect symetry and enunciated a clear rule: any outbuilding or area within seventy-five (75) feet of the house is within the curtilage and any outbuilding or area further than seventy-five (75) feet is outside the curtilage." ***Id.*** at 1296. This conclusion was reached by expressly not considering ***Walker v. United States***, 225 F.2d 447 (5th Cir., 1955) where "curtilage" was held to extend two hundred ten (210) to two hundred forty (240) feet from the house. Even so, applying the "clear rule" defined by ***Saiken***, it is apparent that in the case before this Court, the "curtilage" of the Dupuis-Davison residential complex extended at least to the edge of the cane field, thereby completely engulfing the vehicles which were siezed.

Certiorari should be granted in this matter, therefore, in order to permit this Court to provide a functional treatment of the issues raised by Justice Rehnquist in ***Rakas, Supra.*** The rulings of the Louisiana Supreme Court and the Trial Court in the case at bar, as they stand, operate to provide those who live in rural areas a lesser expectation of privacy with respect to law enforement officers conducting nighttime trespasses than the expectation of persons located in urban areas. Neither historically nor socially can this be justified.

In the instant case, the trucks which were seized by law enforcement officers and in which Petitioners were apprehended

were located entirely on private property immediately adjacent to their residence. They were not on a public highway. They had become, by location and destination, absolutely equivalent to "outbuildings" comprising a portion of the residential compound. The protection of the Fourth Amendment to the United States Constitution must extend to these trucks, therefore, at that location and under those circumstances. The principles expressed by this Court in ***Rakas, Supra,*** demand that.

III. This Court should grant Certiorari to consider whether the lower Courts of Louisiana erred in their finding that officers comprising the Federal-State task force, hidden on private property owned by Petitioners, had probable cause within the meaning of the Fourth Amendment to the United States Constitution, sufficient to justify their seizure of vehicles also located on private property and to justify the ultimate search of those vehicles.

The one factor essential to the legality of any search is the presence of probable cause.

It is clear that when a Search Warrant is based on hearsay, the Affidavit in support thereof must articulate th underlying circumstances upon which the informant bases his conclusion and the circumstances supporting the informant's credibility. See ***Aguilar v. Texas***, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Likewise, a warrantless search, even if justified under an exception to the warrant requirement, must be based on probable cause and there must be an articulable set of underlying circumstances justifying conclusions from an informant.

In the instant case, the testimony during the Hearing on a

Motion to Suppress Evidence revealed that the "facts" of which Law Enforcement Officers allegedly were aware, consisted primarily of speculation and hearsay conclusions. The fatal defects in the information in the instant case are revealed in the following listing.:

(1) A contention by Officer Joachim that one of the trucks which was under surveillance was registered to Zerbe & Sons was, in fact, hearsay information. (Trasncript, Pages 349 - 350);

(2) Officer Joachim, at the Hearing on the Motion to Suppress Evidence, conceded that his assumption that a relationship existed between Mr. Zerbe (a Petitioner herein) and a Mr. Zylstra (suspected of marijuana smuggling), was, in fact, rank hearsay, many times removed from Joachim. (Transcript, Pages 351 - 352).

(3) Officer Joachim assumed that a relationship existed between Petitioner, Dupuis, and Marvin Zylstra, and his initial suggestion that he had firsthand knowledge of such a relationship was later revealed to be nothing more than rank hearsay and speculation. (Transcript, Page 53).

(4) Officer Joachim speculated (and acted upon that speculation by conducting a seizure and search) that marijuana contraband supposedly aboard the trucks under surveillance was brought in on an aircraft between June 11 and June 15, and it was demonstrated during a Hearing on the Motion to Suppress Evidence that that assumption was pure, rank speculation, and, in fact, was totally false. (Transcript, Pages 358 - 360).

(5) Officer Joachim, who made the ultimate decision to seize and search, speculated that observers in the private cane field saw marijuana, but in truth, and in fact, the objects which they saw were not obviously marijuana, and could have contained any number of legal substances. (Transcript, Pages 363 - 354; 408; 471 - 473; 480).

It has been stated that an even higher standard for determination of the existence of probable cause must be applied to warrantless searches than that which must be applied to searches based on a validly issued Search Warrant. ***United States v. Anderson***, 500 F.2d 1311, 1315 (5th Cir., 1974). In order to determine whether or not probable cause existed, the Court must determine whether under the facts and circumstances known to police at the time of the search in question, a reasonable person would have concluded that a crime had or was taking place or, alternatively, that there was contraband upon the premises. See ***Williams v. United States***, 404 F.2d 493 (5th Cir., 1968).

The officers in the case at bar were searching with a view toward uncovering evidence with which to arrest. Probable cause for warrantless arrests may be based only on those facts in existence at the time of the arrest, not on any facts discovered ***after*** the arrest. ***People v. Walker***, 64 Mich. App. 138, 235 N.W. 2d 85 (1975). The burden of proof in a warrantless search is always on the State. ***State v. Allan***, 113 N.J. Super. 245, 273 A 2d 587 (App. Div. 1970). Where, as in the case at bar, the State fails to prove the validity of the arrest leading to the search for and subsequent seizure of the contraband, the evidence is inadmissible and should be suppressed. ***State v. Hinton***, 305 So. 2d 804 (Fla. 4th D. C. A. 1975); ***T. L. W. v. State***, 315 So. 2d 202 (Fla. 3rd D. C. A. 1975).

In the case at bar, officers commenced their surveillance at approximately 7:30 in the evening. It revealed the presence of trucks, not an uncommon occurrence, and a number of persons enjoying a barbeque. (Transcript, Pages 344, 349, 354, 432, 443 - 446, 451, 462, 463, 511, 521 - 522, 565, 567, 583, 584, 638, 639, 654, 689, 690). It is of importance to note that Officer Joachim admitted the presence of a number of automobiles and trucks at the Dupuis residence as early as 2:30 or 3:00 o'clock, P.M. on June 15 (Transcript, Page 344) and the tractor-trailer truck, a focal point of the surveillance, was regularly at the Dupuis residence for weeks prior to the arrest. (Transcript, Pages 349, 354). In addition, it was conceded by Officers Theriot and Lemaire that it was not at all unusual to see a number of vehicles in the vicinity of Petitioners' residence and driveway, including a boat owned by Petitioner and the trailer which was ultimately searched. (Transcript, Pages 654, 688, 689).

At approximately 11:15 to 11:30 in the evening, the barbeque ended and the lights in the barbeque area were turned off. Shortly thereafter, the trucks noved into position for loading or unloading of cargo. Transcript, Pages 452; 453; 458-460; 462-466). Again, such activity would not reasonably appear to be unlawful.

The Court's attention is invited to a recent decision of the Louisiana Supreme Court in ***State v. Rudolph***, 369 So. 2d 1320 (La., 1979) at Page 1324, in which it quoted from "LaFave 'Street Encounters' and the ***Constitution: Terry, Sibron, Peters and Beyond***,65 Mich. L. Rev. 40, 73-74 (1968) in which appears a discussion of ". . . many cases where grounds for arrest have been found lacking because the conduct of the suspect was equivocal, that is, where the possibility of criminal conduct was no greater that the possibility of innocent be-

havior."

During the span of the observation, for brief periods of time, officers observed bales of an unknown substance. (T. 363; 364; 470 - 473; 480; 570; 576; 586 - 588; 590). When questioned as to what was in the bales, the first officer, Customs Air Officer Wade, acknowledged that the bales were identical in shape, form and size to a bale of commercially purchased peat moss admitted into evidence at the Hearing. (T. 480 - 484). The other officer making the observation admitted that in the briefings prior to the commencement of his surveillance, he was preconditioned to believe that if any substance was being unloaded or loaded, that substance undoubtedly would be marijuana. (T. 575 - 576; 585 - 588; 590). The following exchange, as it appears at Page 590 of the transcript, is especially significant:

> "Q. All right; and the difference between you making a guess in that circumstance and you guessing on the night of June 15th was because you were told by your fellow officers that there would be marijuana involved in those trucks?
>
> A. We were looking for marijuana, yes, sir."

Therefore, in essence, these two officers who were engaged in the often competive enterprise of ferreting out crime, jumped to the arbitrary conclusion that the bales contained marijuana when admittedly there were no objective signs such as marijuana gleanings or the odor of marijuana which would perhaps justify that conclusion. A graphic demonstration of this appears at Page 646 of the Transcript where Trooper Trahan, in charge of the Louisiana State Police segment of the investigation,

admitted that the "phony" bale containing peat moss, prepared by Petitioners for the Hearing looked like marijuana, and his only reason for concluding that it did not contain marujuana was that he would not expect marujuana to be lying in the hallway of the courthouse. A reasonably prudent and objective. man, even possessing knowledge that marijuana had been placed in bales of similar size and shape on occasion before, could just as reasonably have concluded that a legal substance was present.

In *State v. Porter*, 324 N.E. 2d 857 (Ct. App. Ind. 1975). the lessor of rural property, while in an adjoining field, observed what he thought was the processing ("stripping") of marijuana. He informed the police who, with the use of binoculars, observed the premises from some 200 yards away. The police obtained a warrant which, as in the case at bar, was subsequently stipulated to be invalid. The Court noted first that the police observations did not fall within the "plain view" doctrine as contended by the State. The essential question, according to the Court, was "whether entry under authority of an invalid warrant can later be justified by reliance on related but distinct theories of law or evidence." 324 N.E. 2d at 859. In affirming the Motion to Suppress Evidence granted below, the *Porter* court stated:

> Further, it is evident that notwithstanding what the officers observed, they entered the premises under authority of a search warrant, for the announced purpose of seizing that which they already knew existed. The purpose for entering was not to arrest, at least not initially.
>
> 'It is a general rule of law that an unlawful arrest cannot be the foundation of a lawful search, nor will the information obtained by an unlawful search

alone, furnish the basis is for a lawful arrest. Where the arrest or search is unlawful to begin with, it is not made lawful by that which afterwards takes place.' (Citations Omitted).

The arrests in this case were made on the basis of an unlawful search and seizure, and that fact cannot be altered by reliance on what the police could have done, or by reliance on how police conducted themselves before or after the impoper entry and seizure. 342 N.E. 2d at 859.

IV. This Court should grant Certiorari to consider whether the lower Court's finding that the warrant requirement of the Constitution of the United States was no violated when law enforcement officers (a) ***seized*** and (b) ***searched*** trucks located on private property when there was no indication that the vehicles were immediately to be moved and when law enforcement officers were available and had more than adequate time and facilities to obtain a warrant prior to movement or to stop the vehicles if they were placed in motion before ever reaching public highways.

A search and seizure carried out without a warrant is ***per se*** unreasonable, unless Law Enforcement Officers can demonstrate that it falls within one of the carefully defined set of exceptions, one of which is the presence of "exigent circumstances", ***Coolidge v. New Hampshire***, 403 U.S. 443, 474 through 475; 91 S. Ct. 2022 29 L. Ed. 564 (1971) Exigent circumstances exist only where, under the facts of the case, it is impracticable to obtain a Search Warrant.

In what appears to be an after-thought, the Louisiana Supreme

Court, at the conclusion of its opinion in this matter, added a paragraph concluding that exigent circumstances existed. ***State v. Dupuis***, 378 So. 2d at 938. The record belies that conclusion.

Initially, it must be remembered that the trucks in question, located as they were on private property, were under direct surveillance by officers for almost five (5) hours before they were seized. Whatever information officers had which was, in fact, speculation, existed for that entire time with the exception of activity in the vicinity of the trucks which allegedly commenced around 11:30 P.M., almost one hour before the ultimate siezure. (Transcript, Page 759). The availability of the United States Magistrate for the purpose of seeking a telephonic Search Warrant under Federal Rules of Criminal Procedure 41(c) (2) is evident throughout the record and from the fact that officers did contact that Magistrate and attempt to obtain a warrant. That attempt was a disaster not only because of the failure of both the Magistrate and officers seeking the warrant to comply with the prerequisites of the Rule but also because of the total lack of a demonstration of adequate probable cause for the issuance of the warrant.(Transcript, Pages 195 - 198, 306 - 309, 330, 331, 332, 340, 347, 349, 351, 352, 353, 357, 358 - 360, 361, 366, 374, 375, 382, 414, 415, 419, 422 - 424, 426 - 428, 470 - 484, 488, 570, 578, 584, 585, 590).

The record reflects that after communcation from Officer Wade, hidden in Petitioners' cane field, to the effect that he had observed bales within one of the trailers, two officers in charge of the entire operations agreed that an apportunity existed to apply for a Search Warrant, but that if the trucks began to move before the warrant was obtained, they would "hit them". (Transcript, Page 633). Thus, there was available to the officers in question, the procedure suggested by this

Court in *Coolidge, Supra*, and by the Louisiana Supreme Court in *State v. Parker*, 355 So. 2d 900 (La., 1978), namely, securing the premises to avoid flight while applying for a Search Warrant.

The principle which must be re-affirmed in this matter and which was apparently ignored by Federal and State Police Officers in the case at bar, is that clearly recognized by Justice Jackson, writing for this Court in *Johnson v. United States*, 333 U.S. 10, 13 - 14, 68 S. T. 367, 92 L. Ed. 436 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Protection consists in requiring that those inferences be drawn by a neutral and detached Magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferrying out crime. Any assumption that evidence sufficient to support a Magistrate's disinterested determination to issue a Search Warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Exigent circumstances sufficient to justify a warrantless search do not exist merely because the objects to be searched are vehicles. The Louisiana Supreme Court in *Parker, Supra*, recognized that automobiles are not automatically excluded from the Fourth Amendment protection. In *Coolidge, Supra*,

this Honorable Court has noted that "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." In making this observation, this Court recognized that a good number of containers, that is, "trucks, suitcases, boxes, brief cases and bags" are as movable as a vehicle. Therefore, more than the fact that a vehicle is in involved is required to establish exigent circumstances. *Id.* at 461.

The "automobile exception", first recognized by this Court in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), was clearly explained by this Court in *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d. 419 (1969). In *Chambers*, this Court found that the stopping of an automobile on a *public* highway constitutes sufficiently exigent circumstances because the opportunity to search was fleeting, the occupants were alerted and the car's contents might never be found again if a warrant were required. This reasoning has been clearly tempered, however, in such cases as *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d. 538 (1976) and *Coolidge v. New Hampshire*, *Supra*. In *Coolidge*, it was determined that even, assuming the presence of probable cause, with respect to a vehicle located on private property, a warrantless search or seizure was unconstitutional:

> The police had ample opportunity to obtain a valid warrant in advance; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property · · · the seizure was therefore unconstitutional and so was the subsequent search at the station house. 403 U.S. at 473 (Part C).

No United States Supreme Court case has permitted the search or seizure of a vehicle on *private* property (absent factually exigent circumstances) even when probable cause exists. See *Cooper v. State of California*, 386 U.S. 58 87 S. Ct 788, 17 L. Ed. 2d. 730 (1967); *Chambers v. Maroney, Supra.* In *Arkansas v. Sanders*, 99 S. Ct. 2586, at Note 14, this Court again emphasized that the seizure of a vehicle under the automobile "exception" has always involved a seizure on a public highway, as opposed to private property. The rationale in *Arkansas*, involves the impracticality of requiring officers to take a seized vehicle from a public highway and place it in a safe location while obtaining a warrant. Obviously, in the case at bar, the vehicles in questions were not on any public highway, were in a safe location, and could have been detained in that location until a warrant was sought.

In the case at bar, it is evident that the Petitioners were alerted to the surveillance. The opportunity to search was not fleeting. The trucks were not on any public highway. The keys were not in the ignition at the time of the search and it was evident to observers of the vehicles that no one was even in the cab of any of the vehicles. Finally, at the time of the search, the premises had been sufficiently secured so as to prevent any movement off the premises by the vehicles and thereby prevent flight. Therefore, the *Carroll* doctrine is clearly inapplicable. (Transcript, Pages 438, 440 - 443, 591 - 592, 633, 639 - 640, 686 - 687).

A clear description of the factual situation appears at Pages 686 and 687 of the Transcript in the following sequence:

Q. Did you find any keys?

A. No, sir, I didn't.

Q. Were the lights on?

A. Inside the cab, yes, sir.

Q. Inside the cab?

A. Inside the cab. Yes, sir.

Q. But not the headlights on the trucks?

A. I don't know if there were any headlights on the truck.

Q. None at all? You mean the trucks could not run at night?

A. There were headlights on it, but they weren't lit.

Q. Thank you. Were the engines running?

A. No, sir, they weren't.

Q. Was there any appearance at all that those trucks were going to move out?

A. Not at that time, no, sir.

The most recent cases under the *Carroll* doctrine have recognized that the doctrine is applicable to the search of moving vehicles, not vehicles which are parked on private property. See *United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972); *United States v. Chapman*, 474 F.2d 300 (5th Cir. 1973); *United States v. Alexander*, 559 F.2d 1339 (5th Cir. 1977). In fact, the doctrine is now popularly referred to as the "warrantless search of a *moving* automobile". (Emphasis Added). *United States v. Anderson*, 500 F.2d 1311 (5th Cir. 1974);

United States v. Nieto, 510 F.2d 1118 (5th Cir. 1975).

No other facts demonstrate the existence of exigent circumstances. The exceptions to the warrant requirement are "jealously and carefully drawn": Jones v. United States. 357 U.S. 493, 499 (1958) 78 S. Ct. 1253, 2 L. Ed. 1514. There must be a showing by those who seek exemption that the exigency of the situation made that course imperative. ***McDonald v. United States***, 335 U.S. 451, 456 (1948). 69 S. Ct. 191, 93 L. Ed 153. Thus, the burden is on those seeking exemption to show the need for it. ***United States v. Jeffers***, 342 U.S. 48 51 72 L. Ct. 93, 96 L. Ed. 59 (1951). In essence, the officers were required to demonstrate to the Court that they literally faced a "now or never situation" whereby, unless they acted to preserve evidence of the crime, that opportunity would be lost in their effort to obtain a search warrant. ***ROADEN V. KENTUCKY***, 413 U.S. 496, 595, 93 S.Ct. 2716, 37 L.Ed. 2d 757 (1973). The "now or never" situation simply did not exist. Where a warrantless search is not conducted under true exigent conditions, the Fourth Amendment has been violated and the fruits of the search should be excluded. ***STATE V. MANKEL***, 27 Ariz. App. 436, 555 P.2d 1124 (1976); ***LUDLOW V. STATE***, 314 N.E. 2d 750 (Ind. 1974).

The lack of exigent circumstances in the instant case is conclusively shown by the de facto attempt to obtain a Search Warrant which failed, not because of the presence of exigent circumstances or lack of time, but because of the legally unsound information relied upon by the Magistrate and the failure of both the Magistrate and Law Enforcement Officers to comply with the safeguards required by Federal Rules for the protection of those whose property Law Enforcement Officers seek to search. See *UNITED STATES V. HART*, 162 F.2d 74 (10th Cir., 1974). Clearly, the issuance of an invalid Search Warrant prior to a search and seizure on the one hand, and a

finding of exigent circumstances, on the other, are mutually exclusive and cannot be reconciled.

Even if there had existed exigent circumstances in the case at bar allowing the ***seizure*** of the trucks in question (and petitioners strenuously contend that no exigent circumstances did, in fact, exist), there certainly were no exigent circumstances allowing the additional warrantless ***searches*** of those trucks. Such a search of these seized trucks on private property, without a warrant, is similar to the search of foot lockers, brief cases, etc., condemned by this Court in previous decisions. Here, the trucks could easily have been seized as they sat dormant on private property, while application for a legal warrant was made. It is apparent that the mere fact that the objects in question are connected with a vehicle does not permit a warrantless search, without exigent circumstances. This Court has confirmed in *COOLIDGE, Supra,* that a vehicle on private property is not, ***per se,*** subject to a warrantless search. In *G.M. LEASING CORPORATION V. UNITED STATES,* 429 U.S. 338, 354, 97 S.Ct. 619, 50 L.Ed. 2d 530, this Court recently acknowledged:

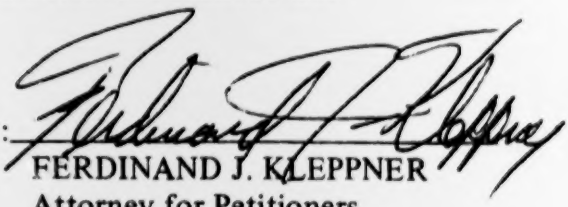
> It is one thing to seize without a warrant property resting in an open area or seizable by levee without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property . . . ***situated on private premises to which access is not otherwise available*** for the seizing officer. Cited with approval in *PAYTON V. NEW YORK,* No. 78-5420 (1980) (Emphasis Added).

CONCLUSION

Petitioners have presented to this Honorable Court a situation requiring the action of this Court for purpose of clarification of previous rulings involving basic and fundamental United States Constitutional Rights. The confusion which exists nationally is apparent by an examination of the opinion of the Louisiana Supreme Court in conjunction with the reasoning of this Court in ***RAKAS V. ILLINOIS, Supra.*** Additionally, there exists nationally the urgent need for clarification by this Court of what has been labeled the "automobile exception". Petitioners pray that their Petition for Writ of Certiorari be granted, therefore, in order to review the Judgments and Opinions of the Supreme Court of Louisiana so that the Courts of this land may have available clear and understandable guidelines and principles for the protection of the citizens of this Nation.

Respectfully submitted,

GRISBAUM & KLEPPNER

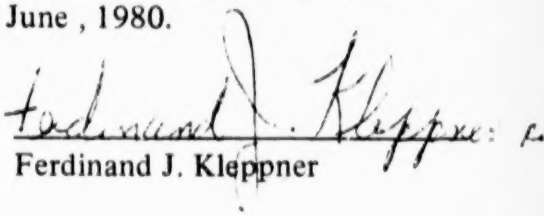
By: 

FERDINAND J. KLEPPNER
Attorney for Petitioners

*(Transcript, Pages 500 - 503; 506 - 510; 519; 520; 522; 523; 529; 537) (Exhibits S - 1, D - 5, 6, 7, 16, 17, 18, 18A) presently in the custody of the Clerk of Court for St. Martin Parish which will not be released without an order of the Court.)

CERTIFICATE OF SERVICE

I, Ferdinand J. Kleppner, an attorney for Petitioner do hereby certify that I have served copies of this Brief to all interested parties. on this the 26 day of June , 1980.



Ferdinand J. Kleppner